IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 24, 2006 Session

KAREN DENISE HUDDLESTON JOHNSON v. JOHN KARL JOHNSON

Appeal from the Chancery Court for Williamson County
No. 27322 Donald P. Harris, Chancellor

No. M2005-00759-COA-R3-CV - Filed May 11, 2006

In this appeal, the ex-wife challenges the trial court's division of marital property, provision of child support and implementation of its own parenting plan regarding custody and visitation. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Robert Todd Jackson, Brentwood, Tennessee, for the appellant, Karen Denise Huddleston Johnson.

Dana C. McLendon, III, Franklin, Tennessee for the appellee, John Karl Johnson.

OPINION

Karen Denise Huddleston and John Karl Johnson were married on February 18, 1989. Two children were born to that marriage. On August 24, 2000, Ms. Johnson filed for divorce in Williamson County, Tennessee, alleging as the sole ground for divorce irreconcilable differences. Almost three years later, she amended her complaint to allege inappropriate marital conduct and abandonment. In her amended complaint, Ms. Johnson averred that the parties had "physically separated on or around November 15, 2001." On April 4, 2003, contemporaneous with the Motion to Amend the Complaint, Ms. Johnson proposed her first parenting plan which provided in pertinent part:

> **2.9 DESIGNATION OF PRIMARY RESIDENTIAL PARENT FOR STATE AND FEDERAL STATUTES:**
> Children named in this parenting plan [are] scheduled to reside the majority of the time with [X] mother [ ] father. This parent is designated primary residential parent solely for purposes of state and federal statutes which require a designation of custody. If parents are joint decision makers as listed in Section 3.3, for purposes of

obtaining health insurance, they shall be considered joint custodians. **This designation shall not affect either parent's rights and responsibilities under this parenting plan.**

2.10 OTHER:

The following special provisions apply to the schedules or residential considerations of the children.

III. DECISION MAKING

3.10 DAY TO DAY DECISIONS

Each parent shall make decisions regarding day-to-day care and control of children while the children is residing with that parent. **Regardless of the allocation of decision making in this parenting plan, either parent may make emergency decisions affecting the health or safety of the children.**

3.2 CHILDREN NURTURE

Mother and Father will conduct themselves with respect to each other and the children so as to provide a loving, stable, consistent and nurturing relationship with the children even though they, themselves, are being divorced. To that end they will not speak derogatorily of each other or the members of the family of the other, will not cause the children to be drawn into any dispute regarding the decisions affecting the children and will not attempt to curry favor with the children to the detriment of the other.

3.3 MAJOR DECISIONS.

Major decisions regarding children shall be made as follows:

Education decisions	[X] mother	[ ] father	[ ] joint
Non-emergency health care	[X] mother	[ ] father	[ ] joint
Religious upbringing	[X] mother	[ ] father	[ ] joint
Extracurricular Activities	[X] mother	[ ] father	[ ] joint
_____	[ ] mother	[ ] father	[ ] joint
_____	[ ] mother	[ ] father	[ ] joint

On April 8, 2003, the trial court entered an order scheduling a Show Cause Hearing on May 13, 2003. Prior to the scheduled hearing, the court entered an Agreed Order on May 12 awarding $725 per month in child support and requiring the parties to submit proposed parenting plans on or before August 15, 2003. On July 6, 2004, Mr. Johnson filed his proposed parenting plan, which contained the following provisions concerning the primary residential custodian and day-to-day decisions:

2.11 Designation of "Primary Residential Custodian"

The children named in this Parenting Plan are scheduled to reside the majority of the time with the Mother. This parent is designated the custodian of the child(ren) solely for purposes of all other state and federal statutes which require a designation or determination of custody. This designation shall not affect either parent's rights and responsibilities under this parenting plan.

. . .

4.1 Day To Day Decisions

Each parent shall make decisions regarding the day-to-day care and control of each child while the child is residing with that parent. Regardless of the allocation of decision making in this parenting plan, either parent may make emergency decisions affecting the health or safety of the children.

On July 2, 2004, Ms. Johnson filed a Motion for Adoption of Her Parenting Plan.

Over a year later, on June 10, 2004, Mr. Johnson, through counsel, moved to set the case for trial. By order entered July 16, 2004, Chancellor Harris set the case for trial on November 8, 2004. Mr. Johnson filed another proposed parenting plan prior to the hearing as well as a Statement of Issues and Proposed Property Settlement. Ms. Johnson filed her own proposed division and offered yet another proposed parenting plan. On January 6, 2005, the trial court entered its decree which included its own parenting plan. That plan contained the following language:

II. DECISION MAKING

A. DAY TO DAY DECISIONS. Each parent shall make decisions regarding the day-to-day care and control of each child while the child is residing with that parent. Regardless of the allocation of decision making in this parenting plan, either party may make emergency decisions affecting the health or safety of the children.

B. CHILD NURTURE: Mother and Father will behave with respect to each other and the children so as to provide a loving, stable, consistent and nurturing relationship with the children even though they, themselves, are being divorced. Mother and Father agree they will not speak badly of each other or the members of the family of the other parent. They will encourage the child to continue to love the other parent and be comfortable in both new families.

* * *

V. DISAGREEMENTS ABOUT JOINT DECISIONS OR MODIFICATIONS OF PLAN. Should a disagreement arise about the Parenting Plan or the parties wish to modify the plan, the parties shall make a good faith effort to resolve the issue through the dispute resolution process, before returning to court. Unless a limiting

> factor listed in T.C.A. 36-6-406 precludes a dispute resolution process prior to court action, or an emergency action is necessary to protect the welfare of the children or a party, the parties agree to the following dispute resolution method:
>
> Disputes between the parties, other than the child support disputes, shall be submitted to mediation by Rule 31 Mediator. In the event of disputes between the parties, the Court orders that all matters excepting child support issues be submitted to a Rule 31 mediator named Diane Marshall if she is available. Husband may participate in mediation telephonically if the mediator believes the mediation can be accomplished in that manner.

In its Decree of Divorce, the trial court ordered Ms. Johnson to transfer $10,000 from her 401K plan to an IRA to be established by Mr. Johnson for that sole purpose. The trial court also named the wife as primary custodial parent of the minor children allowing the parties to alternate custody of the children on Christmas vacations:

> Father shall have the minor children from the Saturday following the last day of school until two weeks before school starts in the fall; Christmas vacation for 2004 shall be as the parties have already agreed; Husband shall have the minor children for entire Christmas vacation in odd numbered years starting in 2005 and Wife shall have the minor children for the entire Christmas vacation in even numbered years; Wife shall have the minor children for the 23rd and 24th day of December in odd numbered years provided she travels to the place of the Husband's residence and this shall be the only transportation that the Wife shall be responsible for. Husband shall have the minor children for the 23rd and 24th day of December in even numbered years provided he travels to the Wife's place of residence; Husband shall pay all transportation expenses for the minor children to visit him at his place of residence because Husband chose to move to Washington State and Wife should not be punished because Husband chose to move; additionally Husband will have the minor children for spring break in odd numbered years and Wife shall have the minor children for spring break in even numbered years; and Husband shall pay all transportation costs for the minor children to visit him.

The court required Mr. Johnson to be responsible for the transportation costs associated with the children's visits to his home state of Washington. The court continued child support in the amount of $725 per month. Of particular note, the following reasoning appears in the decree:

> Husband shall pay child support to the Wife in the amount of $725.00 per month; since child support is based on the non-primary parent having 80 to 82 days of parenting time with the minor children and the Husband's visitation time falls short of that number of days, there will be no abatement of child support during the summer months; although Husband's monthly income amounts to $2,884.27 and, based on that amount, his child support should be $743.00 per month, the Court is

> reducing this child support obligation to $725.00 per month; Husband should be required to either provide medical insurance or reimburse the Wife for the cost of medical insurance; however, the Court is deviating from that requirement and orders that the Husband pay to the Wife the sum of $100.00 per month toward her cost of medical insurance to the minor children partly because of the extra expenses incurred by the Husband for the transportation costs for the minor children and partly to make the amount he is required to pay certain; hence the total amount of child support to be paid by the Husband monthly is $825.00, which includes $725.00 for continuing child support and $100.00 for his contribution to the cost of Wife's medical insurance for the minor children.

The trial court also required Ms. Johnson to be responsible for the first $250 of uncovered medical expenses; after the $250 threshold is reached for each child, the parties were to split the remaining uncovered medical expenses. Said the court: "the rationale for this Order is, until the Husband gets a better job, to let the Husband know exactly what his obligation is and because the Wife makes a little more money than the Husband."

The trial court distributed the remaining marital property as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each party is awarded all property titled in his or her name or in his or her possession, free and clear of any claim or interest of the other party, with the following exception: Wife shall transfer and rollover from her 401(k) the sum of $10,000.00 to an IRA to be established by the Husband for that purpose. The transfer shall be accomplished without any tax consequences to the Wife and Husband is permitted to cash out his money from his IRA if he so desires.
>
> This basis of the Court's calculation of the amount awarded to the Husband is as follows: Wife has a 401(k) in the amount of approximately $45,000.00; Wife had two or three thousand dollars in her 401(k) at the time of the parties' marriage, reducing the amount of marital property in the account to $42,000.00; Husband had cashed out his own IRA in the amount of $11,000.00, reducing the marital amount to $31,000,00; the Court made further adjustment on the basis of the Husband's failure to pay child support for a period during the parties' separation and could have made an adjustment on the basis of the difference in the values of the parties' automobiles; that leaves the Husband probably with a little more property than the Wife but Wife has a greater earning capacity than the Husband at this point.

On January 18, 2005, Mr. Johnson filed a Motion to Alter or Amend to declare the parties divorced as of the final hearing. Ms. Johnson filed her Motion to Alter or Amend on February 4, 2005. On February 15, 2005, the court granted Mr. Johnson's Motion and declared the parties divorced *nunc pro tunc* as of November 8, 2004. Ms. Johnson's Motion to Alter or Amend was denied.

On appeal, Ms. Johnson challenges the distribution from her 401K. In addition, she raises several issues concerning the trial court's parenting plan. She argues that the plan drafted by the court failed to allot decision making authority to her as primary custodial parent, failed to provide adequate support for the children, failed to serve the best interests of the children, failed to require Mr. Johnson to provide life insurance naming the children as beneficiaries, failed to require the provision of health, dental and medical insurance for the children by way of reimbursement, and failed to properly assess the tax exemptions for each child to the mother for every tax year that the children are in her primary custody.

Because the infirmities alleged by Mrs. Johnson in her appeal primarily concern the trial court's findings of fact regarding distribution of marital property and matters of custody and support, our consideration of the issues is accompanied by a presumption of correctness. *See Dalton v. Dalton*, 858 S.W.2d 324 (Tenn.Ct.App.1993); *see also* Tennessee Rule of Appellate Procedure 13(d). It is equally well settled that the distribution of the marital property and, more importantly, the provision of child custody are fact-sensitive inquiries over which trial courts exercise broad discretion. *See Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn.Ct.App. 1996) (Custody determinations will not be overturned absent a preponderance of the evidence to the contrary); *see Ford v. Ford*, 952 S.W.2d 824, 925 (Tenn.Ct.App.1997)(valuation and distribution of marital estate rests within the sound discretion of the trial court).

By the time Ms. Johnson's Petition for Divorce was finally heard in 2004, the parties had already divided their household and property with the exception of Ms. Johnson's 401K. At the hearing, each party presented its own method for assessing the division of the marital estate already in effect. Ms. Johnson argues in her Tennessee Rule of Civil Procedure 59 Motion and on appeal that Mr. Johnson had only paid "meager child support" prior to the Agreed Order of May 12, 2003. She argued in her Motion and argues on appeal that in failing to award her the entire value of the 401K account, the trial court failed to properly offset that deficiency and failed to properly account for the value of property that she alleges she never received from the distribution of the marital assets that were accomplished prior to any court assistance. The court heard only from the two parties. Divorce was granted on stipulated grounds. The only argument between these parties involved the question of whether Mr. Johnson was entitled to a portion of the 401K account and what custodial arrangements were to be made for the parties' minor children. In this regard, Ms. Johnson testified that her 401K was acquired prior to the marriage, and that by the time the parties separated, the value approached $45,000. For his part, the husband had acquired an IRA and 401K of his own. The 401K was liquidated during the course of the marriage, and the IRA was liquidated in August 2003.

Ms. Johnson testified that toward the end of the marriage she graduated from Nashville School of Law and obtained her license to practice law. It is undisputed that Mr. Johnson was laid off from his job at Consolidated Freightways. Thereafter Mr. Johnson moved to Washington state to be with his family of origin. In connection with that relocation, the parties divided the realty and personalty of the marriage including the marital home, art and coin collections, tools, audio and video equipment, and the contents of the parties' joint accounts. In connection with this distribution, both filed their proposed valuation of the assets of the marriage. The sale of the marital home netted

$26,000 in equity. Ms. Johnson testified that she only received $9,700 from that transaction, but presents no record to confirm that figure. Both parties testified that from the proceeds from the sale of the marital home, approximately $4,800 went to pay off the indebtedness on Mr. Johnson's truck. Mr. Johnson argues that $12,000 of the sale of the proceeds went to pay off each party's credit cards. While Ms. Johnson agrees with that assessment, her testimony provides no clear identification of the source of these $12,000 in funds. Nevertheless, she argues that in distributing the property prior to the final hearing, Mr. Johnson liquidated a portion of the family's checking account and approximately $11,000 from his individual retirement account. For his part, Mr. Johnson testified that in relocating from Tennessee to Washington state he acquired new credit card debt which was paid off using the proceeds from the IRA liquidation. He did not dispute the character of those IRA funds as marital property. He did, however, dispute the allegation that he took more than fifty percent of the net proceeds from the sale of the marital home after paying off credit card and secured debt. The trial court was faced with two different assessments of property and chose to reduce any share of Ms. Johnson's 401K by the amount allegedly dissipated by Mr. Johnson prior to assessing an equitable distribution to him of $10,000. Wife nonetheless complains of this method proffering instead her own calculation based on her own testimony at trial. Upon our review of the record, it is clear that the trial judge listened to both parties and made a credibility determination. We find that the evidence does not preponderate against the decision and affirm the trial court in its distribution of marital property.

In this appeal, we labor under the same handicap that afflicted the trial court at the conclusion of the limited proof offered in this case. Prior to his oral findings, the trial judge observed:

> THE COURT: I'll admit the decision in this case was sort of arbitrary, it was because the proof in the case was sort of arbitrary. I kept asking myself if the parties understood what they were doing here today because they didn't come with sufficient proof on a lot of these issues for the Court to make an informed decision. But I'm going to tell you what I have decided.

After the trial judge had entered the January 6, 2005, Final Judgment, Ms. Johnson decided to become her own lawyer, and on February 4, 2005, filed a 19-page Motion to Alter or Amend the Judgment pointing out all manner of shortcomings in the trial court's Final Judgment relative to matters on which little or no proof was introduced prior to the judgment. The Tennessee Rule of Civil Procedure 59 Motion is replete with factual allegations about which there is no evidence in the record. The Motion neither asserts any newly discovered evidence nor seeks to reopen the evidence. Indeed, there is nothing factual asserted in the 19-page Motion which was not known to Ms. Johnson prior to the sparse and very limited testimony on which she submitted her case to the trial court prior to the January 5, 2005, Final Judgment. An effort to reopen the proof would not have been fruitful. *Seay v. City of Knoxville, et al.*, 654 S.W.2d 397 (Tenn.Ct.App.1983).

Ms. Johnson complains that the trial court does not in meticulous detail try to provide *in futuro* micromanagement of the future education, religious training and upbringing of the children, and make her essentially the sole decision maker. This assertion in her Rule 59 Motion is a

significant departure, not only from the parenting plan decreed by the court, but also from the proposed parenting plans submitted by her as a part of her proof.

She further complains in this Motion that the trial court erred in finding Mr. Johnson's monthly income to be $2,884.27 rather than $3, 293.33. The record made before the trial court provides no support for her assertion.

The efforts of Ms. Johnson to retry this lawsuit based upon the allegations of a Rule 59 Motion which allegations are without support in the record before the Court are to no avail. The only witnesses to testify at the trial were Plaintiff and Defendant. Both parties testified in a manner not inconsistent with the finding by the trial court that no marital assets were left to be divided except Ms. Johnson's 401K plan. Indeed, the opening allegation of fact in the Tennessee Rule Civil Procedure 59 Motion of Ms. Johnson is, "In November 2001, the parties sold the marital home, paid all joint debt, divided the marital property and moved to separate residences." She now complains because that is exactly what the trial court found.

On the evidence before the trial court and allowing proper deference to the trial court judgment as to the credibility of witnesses, *Mitchell v. Archibald*, 971 S.W.2d 25 (Tenn.Ct.App.1998), the evidence does not preponderate against any part of the trial court's findings.

The judgment of the trial court is in all respects affirmed and the case remanded to the trial court for such further proceedings as may be necessary. Costs of the cause are assessed to Appellant.

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WILLIAM B. CAIN, JUDGE